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87-340

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1987

NO. _____

GERALD W. WYANT,

APPELLANT

.V.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, AND BOROUGH OF NEWRY,

APPELLEES

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

# JURISDICTIONAL STATEMENT

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153P

## QUESTIONS PRESENTED BY THE APPEAL

1. Does ownership, possession and use of land upon which a neighboring municipality resolves to construct a sewage treatment plant confer an interest of constitutional proportions in the outcome of an administrative adjudication, enforceable by state order directing implementation, in which the resolution is approved, if the landowner will be precluded under state law from seeking to raise elsewhere any legal objections which he had standing to raise in the adjudication itself?

2. With respect to such an interest, is statutory constructive notice of the adjudication by official publication that identifies neither the owner nor the location of the land the best notice practicable under the circumstances, and reasonable under the Due Process Clause,

of the Fourteenth Amendment of the United States Constitution?

3. When the notice that is due to a person who is properly a party to an adjudication is not given and he therefore is not heard therein, can he be bound by an outcome that purports to deprive him of entitlements respecting property interests that are grounded in state law?

TABLE OF CONTENTS

Reports of the Opinions Delivered Below.....5

Grounds on Which this Court's Jurisdiction is Invoked.....5

Constitutional Provisions, Statutes, Regulations and Ordinances Involved.....7

Statement of the Case.....8

Reasons for Consideration of Appeal....30

Appendix.....46

TABLE OF CITATIONS

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737, 49 S.Ct. 487, 73 L.Ed. 931 (1929).....36

Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972).....45

Commonwealth of Pennsylvania, Department of Insurance v. Pennsylvania Coal Mining Assn., 25 Pa. Cmwlth. 3, 358 A.2d 745 (1976).....32

Goldberg v. Kelly, 397 U.S. 254, 98 S.Ct. 1011, 25 L.Ed. 2d 287 (1970).....45

Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed. 2d 725 (1975).....45

Hardee's Food Systems, Inc., v. Commonwealth of Pennsylvania, Department of Transportation, 495 Pa. 514, 434 A.2d 1209 (1981).....33

Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L.Ed. 2d 265, 102 S.Ct. 1148 (1982).....45

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 90 S.Ct. 1554.(1978).....45

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).....35

## THE OPINIONS BELOW

The Environmental Hearing Board of Pennsylvania entered a memorandum opinion and order adverse to the appellant on November 6, 1985. The Commonwealth Court of Pennsylvania entered an interim opinion and order on January 2, 1986, and a final memorandum opinion and order on January 7, 1987. The Pennsylvania Supreme Court denied further review without opinion. All of these decisions were rendered on the basis of the pleadings. None of the opinions rendered have been reported.

## JURISDICTION

This is an appeal from an Order entered May 27, 1987, by the Supreme Court of Pennsylvania in No. 74 W.D. Allocatur Docket, 1987, denying Gerald Wyant's Petition for Allowance of Appeal of an Order entered January 7, 1987, by the Commonwealth Court of Pennsylvania in No. 3247 C.D. 1985, which in turn affirmed on Petition for Review an Order entered

November 6, 1985, by the Environmental Hearing Board of Pennsylvania in E.H.B. No. 84-422-M. The original order of the Board denied Gerald Wyant leave to proceed with administrative appeal of an adjudication made by the Pennsylvania Department of Environmental Resources under the Pennsylvania Sewage Facilities Act.

Rehearing was neither sought nor granted. Notice of appeal was filed in the Supreme Court of Pennsylvania by first-class United States mail posted August 4, 1987. A copy was also mailed to the Commonwealth Court on the same day.

This appeal is taken under 28 U.S.C. §1257(2). Gerald Wyant contends that the Pennsylvania Sewage Facilities Act and other statutes and regulations were construed or applied below in a manner that deprived him of procedural due process guarantees of reasonable notice and opportunity to be

heard, in violation of the Fourteenth Amendment of the United States Constitution.

## CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND ORDINANCES INVOLVED

### Constitutional Provisions

U.S. Const. Amendment XIV, Section 1

Pa. Const., Art. I:
- Section 1
- Section 11
- Section 27

### Statutes of Pennsylvania

Administrative Agency Law, 2 Pa.C.S. §101 et seq:
- Section 101, 2 Pa.C.S. §101
- Section 504, 2 Pa.C.S. §504
- Section 505, 2 Pa.C.S. §505
- Section 702, 2 Pa.C.S. §702

Administrative Code of 1929, April 9, P.L. 177, art. XIX-A, §1921-A, added 1970, Dec. 3, P.L. 834, No. 275, §20, 71 P.S. §510-21

Borough Code, Act of Feb. 1, 1966, P.L. (1965)_____, No. 581,53 P.S. §45101 et seq:
- Section 2009, 53 P.S. §47009
- Section 2010, 53 P.S. §47010
- Section 2022, 53 P.S. §47022

Commonwealth Documents Law, 45 Pa. C.S. §101 et seq:
- Section 904, 45 Pa.C.S. §904
- Section 906, 45 Pa.C.S. §906

Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, as amended, Section 404, 26 P.S. §1-406

Sewage Facilities Act, Jan. 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq:
Section 5, 35 P.S. §750.5
Section 10, 35 P.S. §750.10
Section 16, added July 22, 1974, P.L. 621 No. 208, §9, 35 P.S. §750.16

Statutory Construction Act, Section 922, 1 Pa.C.S. §1922

Administrative Regulations

25 Pa. Code §21.36
25 Pa. Code §21.52
25 Pa. Code §21.53

Ordinances

Borough of Newry, Resolution No. 130, adopted with attachments on November 14, 1983.

STATEMENT OF THE CASE

On November 14, 1983, the Borough of Newry, a municipal corporation of the Commonwealth of Pennsylvania, adopted Borough Resolution No. 130-1983. A form resolution prepared for municipalities like Newry by the Department of Environmental Resources of the Commonwealth of

Pennsylvania, this measure adopted and resolved to implement, after its submission to the Department for approval, an amendment or revision of Newry's official sewage facilities plan. The plan amendment and supporting documents, referred to on the face of Resolution No. 130-1983 as attachments thereto, provided for the construction and operation of a sewage treatment facility, consisting of several aerated lagoons and a sedimentation pond, upon sixteen of the forty-four acres of land owned, farmed and inhabited by Gerald Wyant in Blair Township, an adjoining political subdivision of the Commonwealth.

In Pennsylvania, every municipality is required by statute to develop, adopt, and implement an official plan for sewage services to areas within its jurisdiction. Pennsylvania Sewage Facilities Act, 1966,

Jan. 24, P.L. (1985) 1535, No. 537, §5, 35 P.S. §750.5. The Department of Environmental Resources has the power to approve or disapprove of such plans and to order their submission or implementation. Id., §10, 35 P.S. §750.10.

The Commonwealth of Pennsylvania empowers its boroughs to condemn land beyond the territorial limits of their sovereignty for the purpose of constructing sewage treatment plants. Borough Code, Act of February 1, 1966, P.L. (1965) _____, No. 581, 53 P.S. §2009, 53 P.S. §47009. But no borough may do so before all plans and specifications have been submitted to the Department of Environmental Resources and approved in accordance with existing law. Id., §2022, 53 P.S. §47022. And the Borough Code also provides, in section 2010 thereof, 53 P.S. §47010, that no ordinance for construction of a sewage

treatment plant beyond the borough limits may be adopted without prior publication in a newspaper of general circulation and personal service of the proposed ordinance upon affected landowners like Gerald Wyant at least ten days before official action thereon.

Resolution No. 130-1983 was not served upon Gerald Wyant or published in a local newspaper at any time before or after its adoption. Nor were any other means, formal or informal, attempted to give him actual personal notice of the Borough's intentions. In fact, he was given no notice other than such "constructive" notice as may he have received through the official publication in the Pennsylvania Bulletin, on December 10, 1983, that Department action on the proposed plan revision was pending, and a subsequent publication in the

Pennsylvania Bulletin, on January 14, 1984, that the Department had approved the revision. 13 Pa.B. _____; 14 Pa.B. 188. Neither of these brief notices identified Gerald Wyant himself, the site of the proposed facility in Blair Township or the legal steps available to him. In any event, and not surprisingly, the notices never came to his attention.

The Pennsylvania Sewage Facilities Act provides that any action taken by the Department of Environmental Resources on a revision or amendment of an official sewage facilities plan is taken subject to the right of notice and appeal to the Environmental Hearing Board of the Commonwealth of Pennsylvania, an adjudicatory agency, pursuant to section 1921-A of the Pennsylvania Administrative Code of 1929, as amended, 71 P.S. §510-21, and the Pennsylvania Administrative

Agency Law, as amended, 2 Pa. C.S. § 101 et seq. Sewage Facilities Act, §16, 35 P.S. §750.16.

In Pennsylvania, an order approving an amendment or revision of an official sewage plan is regarded as an adjudication - a final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding - rather than as, for example, a rulemaking or quasi-legislative determination. The adversary hearings conducted by the Environmental Hearing Board under the Administrative Agency Law are quasi-judicial proceedings which culminate in findings of fact and conclusions of law which are judicially reviewable to determine whether they have a basis in law and substantial evidence developed on the record.

The time for taking an appeal to the Environmental Hearing Board from a determination of the Pennsylvania Department of Environmental Resources is not fixed directly by statute. The section of the Administrative Code of 1929 cited in section 16 of the Pennsylvania Sewage Facilities Act provides in relevant part as follows:

> ...
>
> (c) Anything in law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall not be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.
>
> ...
>
> (d) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality

> Board and such rules and regulations shall include time limits for the taking of appeals, procedures for the taking of appeals, locations at which hearings shall be held and such other rules and regulations as may be deemed advisable by the Environmental Quality Board.
>
> ...

Section 504 of the Administrative Agency Law provides simply that:

> No adjudication of the Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard...

The pertinent provisions of the regulations promulgated by the Environmental Quality Board of the Commonwealth of Pennsylvania respecting the manner of service of an adjudication by the Department and the time limits and procedures for perfecting an appeal thereof are found in Title 25 of the Pennsylvania Code and are as follows:

§21.36. Publication of notice

Publication of notice of action

proposed action by the Department or Board in the Pennsylvania Bulletin shall constitute notice to or service upon all persons, except a party, effective as of the date of publication.

...

§21.52. Timeliness and perfection

(a) Except as specifically provided in §21.53 of this title (relating to appeal nunc pro tunc), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin unless a different time is provided by statute, and is perfected in accordance with subsection (b).

...

§21.53 Appeal nunc pro tunc.
(a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in the Courts of Common Pleas of this Commonwealth.

...

Gerald Wyant did not perfect an appeal of the Department's approval of the

Borough's plan revision to the Environmental Hearing Board within 30 days of January 14, 1984, the date of publication in the Bulletin. He had not yet discovered that it had been sought or granted. Subsequently, agents of the Department and Borough entered upon his land with backhoes and other heavy equipment to excavate "test pits" and he investigated.

The sewage treatment facility whose construction was approved in the Department's action will discharge treated sewage wastewaters from a point source on the southeastern corner of Gerald Wyant's farm into Poplar Run, a tributary of the Frankstown Branch of the Juniata River. On March 24, 1984, notice that the Borough had applied to the Department for National Pollution Discharge Elimination Permit No. PA 0081621-which

would identify the probable pollutants to be discharged by the facility, set effluent limitations for each pollutant, and authorize pollu tant discharges within those limitations-was published in the Pennsylvania Bulletin at 14 Pa.B 1030; on July 7, 1984, notice tha t the Borough had applied to the Department for Water Quality Management Permit No. 9784403- which would approve the detailed design specifications and construction procedures for the proposed facility-was published in the Pennsylvania Bulletin at 14 Pa.B. 2342. Both of these applications were made pursu ant to the requirements of the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1937, No. 394, as amended, 35 P.S. § 691.1 et seq.

Notice that the Department had approved both of the permit applications

submitted under the Clean Streams Law was published in the Pennsylvania Bulletin on November 17, 1984, at 14 Pa.B. 4197. On December 17, 1984, Gerald Wyant filed a document with the Environmental Hearing Board that consisted of 130 numbered paragraphs, with a prayer for relief, styled his: (1) notice of appeal from the issuance of NPDES Permit No. PA 0081621 to the Borough of Newry under the Clean Streams Act; (2) notice of appeal from the issuance of Permit No. 97 84403 to the Borough of Newry under the Clean Streams Act; (3) request for leave to appeal, nunc pro tunc, the planning approval* granted to the Borough of Newry under the Sewage Facilities Act; and (4) motion to consolidate proceedings in the matters above. The appeal was subsequently perfected and docketed as EHB No. 84-422-M.

*The somewhat misleading term "planning approval"-which suggests permission to begin development of a plan, rather than a go-ahead for a plan already complete-is the Department's term, used in the official notices. "Plan approval" is more apt.

The authority to take the actions challenged by Gerald Wyant in the foregoing pleading is delegated to the Department of Environmental Resources of the Commonwealth of Pennsylvania in Section 402 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1342. This authority is limited by 33 U.S.C. §1288, in particular, which conditions the issuance by states of NPDES permits on the confirmity of the proposed projects with areawide waste-treatment plans prepared and approved pursuant to the detailed requirements of that section, and by 33 U.S.C. §1442(b)(1)(A), which requires that any NPDES permit issued must apply and ensure compliance with any applicable requirements of 33 U.S.C. §1312 (water-quality based effluent limitations), §1313 (id.); §1314 (technologically-based effluent limitations);

§1316 and § 1317 (toxic pollutants and pretreatment standards); and § 1343. The overall scheme of the FWPCA is administered in Pennsylvania under two interrelated and partially overlapping statutes: whether a proposed sewage project is consistent with a comprehensive plan for water quality management in the watershed as a whole, for example, is an issue ordinarily determined in the proceeding under the Sewage Facilities Act, whereas the adequacy of effluent limitations to conserve the protected uses of the stream, or the adequacy of the facility as designed to achieve compliance with the effluent limitations fixed, will be determined in the proceedings under the Clean Streams Law.

The pleading filed by Gerald Wyant on December 17, 1984 challenged the legality of the actions taken by the Department on

several factual grounds especially relevant under the standards and requirements of both these two interrelated statutes; but, in addition, he raised objections to the siting and design of the project under certain other environmental statutes concerned with the preservation of the state's prime farmlands and the management of construction within the 100-year floodplains of Pennsylvania's waterways, issues which the Department was bound to consider under Article I, Section 27 of the Pennsylvania Constitution.

With particular respect to his right to proceed with an appeal of the actions taken by the Department of Environmental Resources under the Pennsylvania Sewage Facilities Act, Gerald Wyant alleged the matters contained in paragraphs 1 through 23 and paragraphs 126 through 130 of his notice of appeal. These allegations

are set forth verbatim in the appendix hereto. Paragraphs 8 through 15 assert his status as a "party" entitled to proper written notice of an appealable adjudication, pursuant to the Pennsylvania Administrative Agency Law and the regulations of the Environmental Quality Board; the nature of the interest affected by the action of the Department as an interest in "property" i.e., an entitlement, grounded in state law, that cannot be removed except for cause; and Gerald Wyant's standing, as a directly affected landowner, both to appeal to the Board and to raise the Federal constitutional questions here presented. Paragraphs 16 through 23 describe the notice actually given to Gerald Wyant of the proceedings conducted by the Department, characterize it as defective under applicable regulations and statutes as

well as the constitutional standard believed to apply, and contend that refusal to permit his appeal will deprive him of liberty and property without due notice and opportunity to be heard, contrary to the Fourteenth Amendment of the Federal Constitution. Paragraph 126 alleges that these grounds constitute good cause to grant Gerald Wyant leave to appeal nunc pro tunc under 25 Pa. Code §21.53(a), quoted above.

On May 15, 1985, pursuant to Pre-Hearing Order No. 1 of the Environmental Hearing Board, issued December 31, 1984, Gerald Wyant filed a Pre-Hearing Memorandum supplementing and expanding his allegations of fact and setting forth his contentions of law, with detailed citations to case authorities and applicable statutes or regulations. Relevant excerpts from this memorandum are also

included in the appendix.

Hearing of the matters raised by Gerald Wyant in the above-described pleadings was scheduled in due course to take place before the Environmental Hearing Board on September 15, 1985. On that date, at a pre-hearing conference requested by Mr. Wyant, the Borough of Newry orally moved for a continuance of the hearing and for dismissal of Mr. Wyant's appeal of the actions taken by the Department under the Sewage Facilities Act. The continuance was granted but the parties were directed to file written pleadings on the motion for dismissal. The response filed by Mr. Wyant on October 10, 1985, largely incorporated matters already alleged or contended by him in the documents previously filed on December 17, 1984, and May 15, 1985, although it also alleged

certain new irregularities, learned through discovery, that went to the validity of the original plan approval on non-Federal grounds. Excerpts are included in the appendix.

On November 6, 1985, the Environmental Hearing Board issued an Order and Opinion dismissing Gerald Wyant's appeal under the Sewage Facilities Act. No hearing on the motion for dismissal or the reply thereto was conducted beforehand, although the Board, at the conference on September 15, 1985, had indicated that a hearing would be necessary. The Board's Opinion said that Mr. Wyant's motion had only raised matters going to the merits of his appeal, and had not alleged grounds amounting to good cause under 25 Pa. Code §21.53. On December 5, 1985, Gerald Wyant filed a petition for review of that determination with the

Commonwealth Court of Pennsylvania. That petition alleged all constitutional and state statutory objections to the dismissal that had earlier been raised below. The appeal was docketed in the Commonwealth Court as No. 3247 C.D. 1985.

On January 3, 1986, however, the Borough of Newry moved to quash the appeal in the Commonwealth Court, alleging that it was interlocutory because Gerald Wyant's appeals of the actions taken by the Department of Environmental Resources under the Clean Streams Law were still awaiting hearing before the Board below. Mr. Wyant responded that the Borough had already resolved to implement the plan revision approved by the Department, which had the power under state law to order immediate implementation of the specific and detailed provisions of the plan; and that, moveover, principles of

res judicata applied in Pennsylvania would prevent any person from raising issues deemed to have been resolved by the plan revision approval in a later proceeding challenging an implementation order or the issuance of permits under the Clean Streams Law. The Commonwealth Court agreed and held that the order of the Board was final and appealable in an Order and Opinion issued January 22, 1986. And when the appeals of the Clean Streams permits came before the Environmental Hearing Board for hearing during March 10-13, 1986, this opinion proved to be correct: Gerald Wyant was in fact limited to challenging the adequacy of the effluent limitations and facility specifications on narrow, technical grounds, and precluded from raising broader issues concerning the existence of environmentally preferable and allegedly

feasible alternatives to a project of the type and siting contemplated by the Borough.*

Counsel for the parties briefed and orally argued the issues before the Commonwealth Court. Once again, the Borough contended that the action taken by the Department under the Sewage Facilities Act was not final, as a practical matter, with respect to Gerald Wyant, suggesting, for example, that he might seek to raise his objections thereto through preliminary objections to a declaration of taking filed in an eventual condemnation proceeding under state law. (Actually, the Eminent Domain Code of Pennsylvania provides that a condemnee may file preliminary objections that challenge the power and right of the condemnor, under state law, to effect the taking, but only if the same has not been

*As of this date, the Board has yet to issue findings of fact and conclusions of law on the basis of the record made in March 1986.

previously adjudicated. Act of June 22, 1964, Special Session, P.L. 84,§404, as amended, 26 P.S. § 1-406.) This time the Commonwealth Court agreed with the Borough, and affirmed the order of the Environmental Hearing Board in an Order and Opinion dated January 7, 1987.

On February 3, 1987, Gerald Wyant filed a petition for allowance of an appeal of the decision of the Commonwealth Court with the Supreme Court of Pennsylvania. On May 27, 1987, the Pennsylvania Supreme Court entered a per curiam order denying Gerald Wyant's petition, docketed there as No. 74 Western District, Allocatur Docket, 1987, without opinion. Review by this Court is now being sought.

## REASONS WHY THE ISSUES IN THIS CASE REQUIRE PLENARY CONSIDERATION

This case involves straightforward and well-settled Federal principles of procedural due process, which, however,

are presented for application in the context of a rather complex state statutory scheme for the administrative adjudication of environmental interests. The appellant admits that he hesitated before concluding that this case was reviewable here by appeal under 28 U.S.C. §1257(2) rather than by writ of certiorari under 28 U.S.C. §1257(3). Nevertheless it is finally difficult to conclude otherwise.

Before the administrative agency and the appellate courts below, Gerald Wyant refrained from explicitly attacking the statutes and regulations whose constitutional validity - as they have finally been applied to the circumstances of this case - is now called more directly into question. Instead, he argued to those tribunals that these statutes and regu lations must be interpreted in a

manner that is consistent with the requirements of the Due Process clause of the Fourteenth Amendment.

For example, he contended that the term "party" as it is used in the statutes and regulations which require that all parties must be given written notice of an adjudication, and which provide that no adjudication shall become effective nor any appeal period begin to run against a party until he has been given such notice, must be interpreted to include those persons who should be made parties to the proceedings because their interest in the outcome is of constitutional proportions. The term as it appears in this context has already been so construed in Pennsylvania. Commonwealth of Pennsylvania, Department of Insurance v. Pennsylvania Coal Mining Ass'n., 25 Pa.Cmwlth. 3,

358 A.2d 745 (1976). And the highest court of Pennsylvania has already held that a landowner cannot constitutionally be deprived of significant incidents of his ownership by an administrative adjudication without a meaningful opportunity to be heard therein. Hardee's Food Systems, Inc. v. Commonwealth of Pennsylvania, Department of Transportation, 495 Pa. 514, 434 A.2d 1209 (1981) (ingress and egress upon abutting public street).

Similarly, the regulations of the Pennsylvania Environmental Quality Board adopted under Section 1921-A of the Pennsylvania Administrative Code of 1929 and set forth above rest upon the following sections of the Commonwealth Documents Law of Pennsylvania:

> §904. Constructive notice.
>
> Unless otherwise specifically provided by statute other than a provision of this title, the publication under this part (in the

> Pennsylvania Bulletin) of any document required or authorized by this part to be so published shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject to or affected thereby. (emphasis added)
>
> ...
>
> §906. Reasonable notice of hearing.
>
> Whenever notice or or opportunity to be heard is required or authorized to be given by the Commonwealth government by or under any statute, or may otherwise be properly given, the notice, except in cases where notice by publication is insufficient in law, shall be deemed to have been given to all persons residing within this Commonwealth, and to all persons owning or having any interest in any property situated within the limits thereof, if said notice shall be published in the bulletin...(emphasis added)

45 Pa. C.S. §§904, 906. Again and again, Gerald Wyant argued that constructive notice to him by official publication was insufficient in law, the method neither being such as was reasonably calculated, under all the circumstances,

to apprise him of the pendency of the administrative action and afford him an opportunity to present his objections, nor constituting such notice as one desirous of actually informing him might reasonably adopt - given the magnitude and singular nature of his interest as well as the ease with which he could have been contacted - to accomplish that end. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

One ought properly to be dismayed by the fact that, more than 35 years after the decision in Mullane, patently fictional notice continues to be rule under statutes of the kind it invalidated, and persons continue to be deprived of important interests in liberty and property without opportunity to be heard, with the blessing of state courts. Pennsylvania is somewhat unusual in

having a Statutory Construction Act, among whose provisions is the presumption, set forth at 1 Pa. C.S. §1922(4), that its General Assembly does not intend to violate the United States Constitution by its enactments. Again and again, Gerald Wyant sought to have the administrative agency and the courts below squarely address the issue once again presented here; in each instance, however, the issue was largely or wholly evaded. Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737 (1929).

The Environmental Hearing Board, for example, mischaracterized the grounds he adduced in support of his right to proceed as consisting only in the alleged merits of his appeal under the Sewage Facilities Act; then, falsely analogizing his situation to that of a litigant who

had appeared in a court proceeding but failed thereafter to seek timely appellate review of an adverse determination, dismissed his appeal on the ground that he had not alleged outright fraud in the proceedings that had taken place in his absence before the Department. The Commonwealth Court first declined to quash review, on the ground that, with respect to Gerald Wyant, the determination made by the Department under the Sewage Facilities Act was final; and then, after Mr. Wyant had already been precluded in a collateral proceeding from raising substantial environmental issues deemed to have been resolved by the plan revision approval, upheld the Environmental Hearing Board on the ground that the plan revision approval, although specific in its terms and enforceable, was somehow merely preliminary, in a

sense that would preclude the existence of procedural due process rights. (In so holding, the Commonwealth falsely assimilated the adjudicatory proceedings mandated by the Pennsylvania Sewage Facilities Act to the quasi-legislative, fact-finding community highway hearings of the kind mandated by 23 U.S.C. § 128 and discussed in Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402 (1971).) The Pennsylvania Supreme Court declined even to review the case.

Any plan or plan revision submitted to the Pennsylvania Department of Environmental Resources under the Sewage Facilities Act is required by that act to take adequate consideration, inter alia, of any existing state plan affecting the development, use and protection of water and other natural resources. 35 P.S. §750.5(d)(5). In the pleading he filed,

with the Environmental Hearing Board on December 17, 1984, Gerald Wyant cited the following excerpts from the Environmental Master Plan for the Commonwealth of Pennsylvania, Environmental Policy for Prime Farmlands, 25 Pa. Code §§ 9.111-9.114:

> The productive farmlands of the Commonwealth of Pennsylvania are being converted daily to nonagricultural land uses. Increasing urban land use pressures and decreasing agricultural productivity are major factors contributing to the conversion of agricultural lands, especially near urban centers. A broad-based agricultural development program is necessary to prevent the future loss of farmlands of this Commonwealth. An important part of this program are environmental policies directed to the protection of the valuable prime agricultural soil resources of the Commonwealth. The concern for these resources must be translated through policies which will strengthen the agricultural economy and encourage farming in areas having prime farmlands...
>
> The provision of public services and capital expenditures into areas with prime farmlands tends to

encourage the conversion of land to more profitable nonagricultural uses. In active agricultural areas special care should be taken to ensure that public investments will not destroy the environmental value of these lands...

It is the environmental policy of the Commonwealth of Pennsylvania to encourage only the extension of public services and facilities which are compatible with the maintenance of economically viable agricultural areas and to protect areas where prime farmlands are being retained as open space in accordance with land use plans...

Evidence gathered in the Commonwealth of Pennsylvania suggests that local governments cannot preserve prime farmlands by themselves. Land use controls, public acquisition and preferential tax programs to protect agricultural lands should be in support of environmentally sensitive land policy planning at all levels of government. Freqently conflicting objectives of transportation, housing, sewer, and recreation plans at the state, regional, and local level indicate the need for a strong land policy framework to coordinate efforts to protect prime farmlands...

He similarly cited sections of the Master Plan dealing with Pennsylvania's Environ-

mental Policies for Floodplains, 25 Pa. Code §§9.131-9.135.

Gerald Wyant is not, of course, seeking to have this Court enforce the substantive environmental policies of Pennsylvania. But the above-quoted provisions point to certain substantial considerations of public policy that clearly do underly the issue in this case.

State and local governments today are very much aware that vociferous public opposition from their constituents is easily aroused by any proposal to locate an environmentally or esthetically objectionable waste treatment facility almost anywhere within their jurisdictions. Understandably, officials are often anxious to avoid the political fallout or the protracted, expensive litigation that can be the result of such a proposal.

For local governments, therefore, the temptation to locate such facilities beyond the territorial limits of their jurisdictions, upon the lands of others, preferably not numerous or economically powerful, to whom their officials have no political accountability, is a great one. Often, however, it is just such politically weak or isolated persons who have interests most deserving of environmental protection under applicable state law.

Pennsylvania's statutory scheme is tailored to provide a particular solution to this problem. A borough like Newry may condemn farmland in an adjoining township for construction of a sewage treatment plant, but any resolution for construction must be served in advance upon all directly affected landowners outside the borough, and no construction

may commence until the Department of Environmental Resources has reviewed and approved all plans and specification in accordance with existing laws. Proceedings before the Department may be conducted without regard to the formal adversary procedures of the Pennsylvania Administrative Agency Law-and perhaps without exhau stive consideration of the merits of the positions taken by all participants-but all parties to those proceedings, including those persons who, although absent therefrom, have an interest in the outcome that is of constitutional dimensions, mus t receive written personal notice of the adj udication made. Thereafter, any party may obtain formal, de novo, adversary review by the Environmental Hearing Board, whose ultimate decision m ust be based upon all applicable environmental

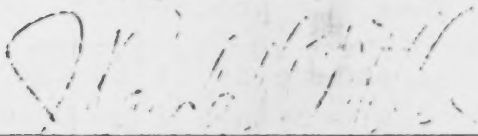
statutes and regulations as well as all substantial evidence developed on the record.

It is not by accident that, under the statutory scheme, these proceedings must occur before the filing of a declaration of taking can divest an affected landowner of his proprietary interest in the subject thereof. Were it not so, a prospective condemnee in Pennsylvania might yet file, in response to the declaration, preliminary objections that challenge the power and right under law of the foreign municipality to take his land; but when the proceedings contemplated by the scheme as it in fact exists have been exhausted, that power and right will be deemed to have been already adjudicated.

The actions taken below ha ve deprived Gerald Wyant of a substantial entitlement, grounded in Pennsylvania

law, which cannot be terminated except for cause. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Goss v. Lopez, 419 U.S. 565 (1975); Board of Regents v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). Due process considerations come into play whenever there is state action that finally terminates or cuts off an interest in property. Logan, above; Mullane, above.

Respectfully submitted,



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# APPENDIX

INDEX

Order of the Supreme Court of Pennsylvania..... A-3

Opinions and Orders Rendered by Other Courts and Administrative Agencies Below:

By the Environmental Hearing Board of the Commonwealth of Pennsylvania on November 6, 1985... A-4

By the Commonwealth Court of Pennsylvania on January 22, 1986..... A-10

By the Commonwealth Court of Pennsylvania on January 7, 1987..... A-16

Notice of Appeal filed August 4, 1987..... A-21

Text of Constitutional Provisions, Statutes, Regulations and Ordinances Involved..... A-23

Excerpts from the Record Made by Gerald Wyant Below:

Filed with the Environmental Hearing Board on December 17, 1984..... A-53

Filed with the Environmental Hearing Board on May 15, 1985.. A-68

Filed with the Environmental Hearing Board on October 10, 1986..... A-88

Filed with the Commonwealth Court of Pennsylvania on December 5, 1985.....A-91

Filed with the Commonwealth Court of Pennsylvania on February 5, 1986.....A-97

Filed with the Supreme Court of Pennsylvania on February 3, 1987.....A-103

THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

In Re: Gerald W. Wyant, Petitioner,
v. Commonwealth of Pennsylvania,
Department of Environmental Resources
and Borough of Newry No. 74 W.D.
Allocatur Docket, 1987

"May 27, 1987
Petition Denied
Per Curiam"

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

GERALD W. WYANT,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
RESOURCES,

Appellee

and

BOROUGH OF NEWRY, Docket No. 84-422-M

Appellee

OPINION NOT REPORTED

OPINION

AND

ORDER

Pursuant to regulation, the Department of Environmental Resources (DER) caused to be published in the Pennsylvania Bulletin on January 14, 1984 its approval of a revision to the Official Sewage Facilities Plan of the Borough of Newry.

On December 17, 1984, Gerald W. Wyant (Appellant) filed a notice of appeal with the Board.

On September 20, 1985, the Borough of Newry (Permittee/Appellee) filed with the Board its Motion to Dismiss Appeal (Motion), and on October 15, 1985, Appellant filed its Appellant's Reply To Permittee's Motion to Dismiss (Reply).

In its Motion, Permittee alleges that the Board lacks jurisdiction to

hear this appeal since the appeal was not filed within thirty (30) days of the date of publication of DER's action in the Pennsylvania Bulletin, pursuant to the provisions of 25 Pa. Code §21.52.

Under the provisions of 25 Pa. Code §21.52(a) "jurisdiction of the Board" does not attach unless the appeal is filed within thirty (30) days after publication in the Pennsylvania Bulletin.

In his reply, Appellant urges the Board to accept his appeal nunc pro tunc, or to dismiss the motion as untimely filed.

Other than a recitation of the various merits of his appeal, Appellant cites no legal reasons why the appeal should be allowed nunc pro tunc. The Board has issued numerous decisions wherein the standards for grant of an appeal nunc pro tunc have been established

and, unfortunately for Appellant, those standards have not been alleged or met in this appeal.

As we stated in East Side Landfill Authority d/b/a East Side Sanitary Landfill v. DER 1982, EHB 292:

> "To allow an appeal nunc pro tunc, the allowance must be based on extraordinary conditions and must involve fraud or some breakdown in the courts' operation through. . . default of its officers, whereby the party has been impaired."

1982 EHB 292, at 301, citing Township of Franklin, 2 Pa. Cmwlth, 496, 276 A.2d 549 (1971). We see no such conditions present in this appeal.

Appellant also alleges that the Motion is untimely pursuant to the provisions of 25 Pa. Code §21.64 and the Board's Pre-Hearing Order No. 1 issued December 31, 1984. The allegation is not specific and does not specify wherein and in what respects

the Motion is untimely, and is therefore dismissed as being without merit.

The allegation of late filing by Appellant is of a jurisdictional nature, and the record reveals that the appeal was indeed filed after more than thirty (30) days had elapsed from the date of publication in the Pennsylvania Bulletin. It is well established that this Board is without jurisdiction to hear an appeal which has been filed untimely. Rostosky v. Commonwealth of Pennsylvania, Department of Environmental Resources, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

Accordingly, the appeal cannot be sustained.

ORDER

AND, NOW, this 6th day of November, 1985, upon consideration of the Motion To Dismiss this appeal filed

by Permittee/Appellee herein, and the Reply filed by Appellant, the appeal of Gerald W. Wyant, at EHB Docket No. 84-422-M is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling, Chairman

Anthony J. Mazullo, Jr., Member

Edward Gerjuoy, Member

cc: Bureau of Litigation

For DER: George Jugovic, Jr., Esq.
Central Region

For Appellant: J. Randall Miller, Esq.
Altoona, PA.

For Permittee: Terry R. Bossert, Esq.
McNees, Wallace & Nurick
Harrisburg, PA.

DATED: November 6, 1985

GERALD W. WYANT,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL
RESOURCES, AND BOROUGH OF
NEWRY,

Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
NO. 3247 C.D. 1985

BEFORE: HONORABLE PAUL S. LEHMAN,
Senior Judge

HEARD: January 17, 1986

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE LEHMAN FILED: January 22, 1986

Before the Court is respondent Borough of Newry's application to quash petitioner Gerald W. Wyant's petition for review of an Environmental Hearing Board (EHB) decision denying him permission to appeal nunc pro tunc the Department of Environmental Resources' decision granting planning approval to respondent Borough of Newry. Such planning approval, issued pursuant to the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1-.20, is a prerequisite to the grant of permits which are necessary for the construction of a sewage processing facility in the Borough. The site of the proposed facility is on land adjacent to Wyant's property.

The Borough argues that the denial

of permission to appeal the Department's approval of a revision to the Borough's official plan for sewage services is an interlocutory decision not yet subject to judicial review. It contends that since Wyant is participating in proceedings before the EHB that may result in the Borough's failure to obtain the permits necessary to construct the sewage facility, he is not yet "out of court." The Borough stresses that the litigation before the EHB has not ended, and that therefore the order denying permission to appeal nunc pro tunc cannot be construed as final.

In opposition, Wyant notes that although he continues to litigate the propriety of granting permits necessary for the construction of the sewage facility, those permits are mandated by Clean Streams Act, Act of June 22, 1937,

P.L. 1987, as amended, 35 P.S. §§691.1-.1001, while the planning approval that he will contest if permitted to appeal nunc pro tunc is a requirement under the terms of the Pennsylvania Sewage Facilities Act. He directs our attention to Toro Development Co. v. Department of Environmental Resources, 56 Pa. Commonwealth Ct. 471, 425 A.2d 1163 (1981), where this Court distinguished a challenge to departmental approval of a specific sewage facility as the treatment site for sewage from a particular housing area from a challenge to the design, construction and connection of the sewer line itself. Arguments appropriate to the former could not properly be heard in proceedings for the permits necessary to the latter. Reversal of the EHB decision was necessary in Toro Development because the EHB

had erroneously permitted and subsequently sustained attacks on the department's sewage plan revision approval during the hearing on the construction permits.

Analysis of these arguments leads to the conclusion that the order denying permission to appeal is a final order because the order sought to be appealed i.e. the Department's planning approval is a final order which may not subsequently be collaterally attacked through challenges to the permits required by The Clean Streams Act. Toro Development. Thus, while the Borough is correct in saying that Wyant may yet be successful in preventing the construction of the facility because the EHB may refuse to issue design and construction permits, if an appeal is not permitted from the denial of permission to appeal nunc pro tunc, Wyant's

opportunity to challenge approval of the revision to the Borough's official plan for sewage treatment which permits the facility to be located as planned will have passed forever.

Accordingly, we shall deny the application to quash.

Paul S. Lehman, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

GERALD W. WYANT,

Petitioner

No. 3247 C.D.1985

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, AND BOROUGH OF NEWRY,

Respondents

BEFORE: Honorable David W. Craig, Judge
Honorable Francis A. Barry, Judge
Honorable Jacob Kalish, Senior Judge

ARGUED: September 9, 1986

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BARRY FILED: January 7, 1987

This is an appeal from an order of the Environmental Hearing Board (Board) dismissing a petition by Gerald W. Wyant (petitioner) requesting leave to file an appeal nunc pro tunc. We affirm.

In November of 1983, the Borough of Newry (Borough) adopted a revision to its sewage disposal plan. Notice of the revision was published in the Pennsylvania Bulletin on December 10, 1983. The Department of Environmental Resources (DER), pursuant to the Pennsylvania Sewage Facilities Act, Act of January 24, 1966 P.L. (1965) 1535, as amended, 35 P.S. §§750.1-750.20, approved the plan and published notice of its approval in the Pennsylvania Bulletin on January 14, 1984. On December 17, 1984, petitioner filed a notice of appeal with the Board seeking

to appeal nunc pro tunc DER's approval of the plan. The request was denied and this appeal followed.

An appeal from a DER action must be taken within thirty (30) days from the date when notice of the action appears in the Pennsylvania Bulletin. 25 Pa. Code §21.52. Since it is undisputed that petitioner did not attempt to appeal DER's approval of the plan until eleven months after the publication of the notice, the only question before us is whether the Board abused its discretion in refusing to allow the appeal nunc pro tunc. The Board may grant an appeal nunc pro tunc upon a showing of good cause. 25 Pa. Code § 21.53. Good cause is established when the delay in filing the appeal is due to extraordinary conditions involving fraud or a breakdown in the court's

operation through a default of its officers which results in injury to the party seeking the appeal nunc pro tunc. Western Pennsylvania Water Co. v. Board of Property Assessment, Appeals & Review, 63 Pa. Commonwealth Ct. 472, 439 A.2d 1259 (1981).

Petitioner maintains that he has established good cause by showing that he received no personal notice of DER's approval of a plan which allegedly[1] proposed the construction of a sewage plant on his property. We find no merit in this argument for the simple reason that petitioner was not entitled to personal notice. The approval of the plan was merely a preliminary procedure in the planning stage of a public project which did not affect petitioner's property. In Condemnation Route 201, 22 Pa. Commonwealth Ct. 440, 349 A.2d 819 (1975),

we held that public notice of a hearing on the environmental impact of a highway project was sufficient and the owners of the land to be taken by the project were not denied due process by lack of personal notice because their rights at that point were no greater than the rest of the public.

Inasmuch as petitioner did receive adequate public notice of the plan's approval, we conclude that the Board properly held that petitioner presented no valid reason why his appeal should be allowed nunc pro tunc.

Affirmed.

Francis A. Barry, Judge

FOOTNOTE

[1]Petitioner offers no evidence in support of his allegation that the plan specifically proposed to use his land as the site for the sewage facility. DER maintains that the plan did not actually locate the facility. This factual dispute was not resolved by the Board.

GERALD W. WYANT,
Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
RESOURCES,
Respondent

and

BOROUGH OF NEWRY,
Respondent

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PETITION FOR ALLOWANCE OF APPEAL

NO. 74 W.D. Allocatur Docket, 1987

NOTICE OF APPEAL

Notice is hereby given that Gerald W. Wyant, Petitioner above-named hereby appeals to the United States Supreme Court from the Order entered May 27, 1987, denying his Petition for Allowance of Appeal of the Order entered by the Commonwealth Court in Docket No. 3247 C.D. 1985 on January 7, 1987, affirming on Petition for Review an Order of the Environmental Hearing Board of the Commonwealth of Pennsylvania entered November 6,

1985, in EHB Docket No. 84-422-M.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

This appeal will present the following question: whether, in denying Gerald Wyant a right to proceed before the Environmental Hearing Board with the appeal he sought to prosecute under the Sewage Facilities Act, statutes and administrative regulations were construed or applied in a manner that deprived him of his procedural due process guarantees of reasonable notice and opportunity to be heard under the Fourteenth Amendment of the United States Constitution.

Dated August 4, 1987.

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CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND ORDINANCES INVOLVED

Constitution of the United States:

AMENDMENT XIV.--CITIZENSHIP: PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the Commonwealth of

Pennsylvania, Article I:

That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE that---

§1. Inherent rights of mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

§11. Courts to be open; suits against the Commonwealth

All Courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be

brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

§27. Natural resources and the public estate

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Administrative Agency Law, 2 Pa.C.S.§101 et seq.:

§101 Definitions

Subject to additional definitions contained in subsequent provisions of this title which are applicable to

specific provisions of this title, the following words and phrases when used in this title shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Adjudication." Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture of property, paroles, pardons or releases from mental institutions.

"Agency." A government agency.

"Appeal" Includes proceedings on petition for review.

"Commonwealth agency." Any executive agency or independent agency.

...

"Party." Any person who appears in a proceeding before an agency who has a direct interest in the subject matter of such proceeding.

"Person" Includes a government unit or an agency of the Federal Government.

1978, April 28, P.L. 202, No. 53, §5, effective June 27, 1978.

§504. Hearing and record

No adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. All testimony shall be stenographically recorded and a full and complete record shall be kept of the proceedings.

1978, April 28, P.L. 202, No. 53, §5, effective June 27, 1978.

§505. Evidence and cross-examination

Commonwealth agencies shall not be

bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be admitted. Reasonable examination and cross-examination shall be permitted.

§507. Contents and service of adjudication.

All adjudications of a Commonwealth agency shall be in writing, shall contain findings and the reasons for the adjudication, and shall be served upon all parties or their counsel personally, or by mail.

§702. Appeals

Any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial

procedure).

1978, april 28, P.L. 202, No. 53, §5, effective June 27, 1978.

Administrative Code of 1929, as amended, 71 P.S. §67.1 et seq.:

§510-21. (Adm. Code §1921-A). Environmental Hearing Board

(a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," on any order, permit, license or decision of the Department of Environmental Resources.

(b) The Environmental Hearing Board shall continue to exercise any power to hold hearings and issue adjudications heretofore vested in the several persons departments, boards and commissions set

forth in section 1901-A of this act.

(c) Anything in anylaw to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.

(d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the

board shall have the power to grant a supersedeas.

(e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits from the taking of appeals, procedures for the taking of appeals, locations at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board...

The Borough Code, 53 P.S. §45101 et seq.:

§47009. Extensions beyond borough limits; eminent domain

The borough may extend the necessary sewer mains and outlets beyond the limits of such borough, to a point where such sewage is to be disposed; and shall have

power to enter upon and condemn such lands, property and materials for the construction of all such sewer mains, outlets, and treatment works as may be necessary for the disposal of such sewage. 1966, Feb.1, P.L. (1965)---No. 581, §2 009.

§47010. Notice of certain ordinances

No ordinance for any construction of sewers or treatment works beyond the limits of the borough shall be adopted until notice thereof has been given, by publication of the proposed ordinance, once a week for four weeks in one newspaper of general circulation in the borough, and also by serving copies of such proposed ordinance upon all land owners through whose land such sewer is to pass, or on whose lands any treatment works are to be located, at least ten days before final action thereon. But no

notice, as herein provided, shall be required where such construction beyond the limits of a borough is entirely within the limits of any street or State highway. In such cases a written notice shall be given to the corporate authorities of the municipality or township having jurisdiction over such street and consent of the State Department of Highways shall be obtained in the case of any State highway, before construction is commenced. 1966, Feb. 1, P.L. (1965)---No. 581, §2010.

§47022. Approval of Sanitary Water Board

No such sewer or sewage treatment plant shall be constructed until plans and specifications have been submitted to the Sanitary Water Board, and approved in accordance with provisions of existing laws. 1966, Feb.1, P.L. (1965)---No. 581, § 2022.

Commonwealth Documents Law, 45 Pa.C.S. §101 et seq.:

§904. Constructive notice

Unless otherwise specifically provided by statute other than a provision of this title, the publication under this part of any document required or authorized by this part to be so published shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby.

1976, July 9, P.L. 877, No. 160, §1, effective in 60 days.

§906. Reasonable notice of hearing

Whenever notice of hearing or of opportunity to be heard is required or authorized to be given by the Commonwealth government by or under any

statute, or may otherwise properly be given, the notice, except in cases where notice by publication is insufficient in law, shall be deemed to have been given to all persons residing within this Commonwealth, and to all persons owning or having any interest in any property situated within the limits thereof, if said notice shall be published in the bulletin at such time that the period between the date of publication as specified in section 903(a)(relating to effective date of documents) and the date fixed in such notice for the hearing or for the termination of the opportunity to be heard shall be:

(1) not less than the time specified for the publication of the notice by the appropriate statute; or

(2) not less than 15 days when no time for publication is specified by

statute, without prejudice, however, to the effectiveness of any notice of less than 15 days where such shorter period is reasonable.

1976, July 9, P.L. 877, No. 160, § 1, effective in 60 days.

Eminent Domain Code, 26 P.S. §101.1 et seq.:

§1-406. Preliminary objections

(a) Within thirty days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. The Court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency

of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.

(b) Preliminary objections shall state specifically the grounds relied upon.

(c) All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.

(d) The condemnee shall serve a copy of the preliminary objections on the condemnor within seventy-two hours after filing the same.

(e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title. If preliminary objections are finally

sustained, which have the effect of finally terminating the condemnation, the condemnee shall be entitled to damages as if the condemnation had been revoked under section 408 to be assessed as therein provided. If an issue of fact is raised, the court shall take evidence by depositions or otherwise. The court may allow amendment or direct the filing of a more specific declaration of taking. 1964 Sp.Sess., June 22, P.L. 84, art.IV. §406. As amended 1969, December 5, P.L. 316, §1.

Sewage Facilities Act, 35 P.S. §750.1 et seq.:

§750.5 Official plans

(a) Each municipality shall submit to the department an officially adopted plan for sewage services for areas within its jurisdiction within such reasonable period as the department may prescribe,,

and shall from time to time submit revisions of such plan as may be required by rules and regulations adopted hereunder or by order of the department: Provided, however, That a municipality may at any time initiate and submit to the department revisions of said plan. Revisions shall conform to the requirements of subsection (d) of this section and the rules and regulations of the department.

(d) Any person who is a resident or property owner in a municipality may request the department to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the resident's or property owner's sewage disposal needs. Such request may only be made after a prior demand upon and refusal by the municipality to so revise

its official plan. The request to the department shall contain a description of the area of the municipality in question and an enumeration of all reasons advanced by said person to show the official plan's inadequacy. Such person shall give notice to the municipality of the request to the department.

(c) The required plan or any revision thereof may be submitted jointly by two or more municipalities.

(d) Every official plan shall:

(1) Delineate areas in which community sewage systems are now in existence, areas experiencing problems with sewage disposal including a description of said problems, areas where community sewage systems are planned to be available within a ten year period, areas where community sewage systems are not planned to be available within

a ten year period and all subdivisions existing or approved.

(2) Provide for the orderly extension of community interceptor sewers in a manner consistent with the comprehensive plans and needs of the whole area, provided that this section shall not be construed to limit the development of such community facilities at an accelerated rate different than that set forth in the official plan.

(3) Provide for adequate sewage treatment facilities which will prevent the discharge of untreated or inadequately treated sewage or other waste into any waters or otherwise provide for the safe and sanitary treatment of sewage or other waste;

(4) Take into consideration all aspects of planning, zoning, population estimates, engineering and economics so

as to delineate with all practical precision those portions of the area which community systems may reasonably be expected to serve within ten years, after ten years, and any areas in which the provision of such services is not reasonably foreseeable;

(5) Take into consideration any existing State plan affecting the development, use and protection of water and other natural resources;

(6) Establish procedures for delineating and acquiring on a time schedule consistent with that established in clause (4) of this subsection, necessary rights-of-way or easements for community sewage systems;

(7) Set forth a time schedule and proposed methods of financing the construction and operation of the planned community sewage systems, together with

the estimated cost thereof;

(8) Be reviewed by appropriate official planning agencies within a municipality, including a planning agency with areawide jurisdiction if one exists, in accordance with the act of July 31, 1968 (P.L. 805, No. 247), known as the "Pennsylvania Municipalities Planning Code," as amended, for consistency with programs of planning for the area, and all such reviews shall be transmitted to the department with the proposed plans; and

(9) Designate municipal responsibility for implementation of the plan.

(e) The department is hereby authorized to approve or disapprove official plans for sewage systems submitted in accordance with this act within one year of date of submission and revisions of official plans within such lesser

time as the regulations shall stipulate.

(f) The department is authorized to provide technical assistance to counties, municipalities and authorities in coordinating official plans for sewage systems required by this act, including revisions of such plans.

(g) For purposes of this act, the department is authorized to cooperate with appropriate private organizations.

§750.10 Powers and duties of the Department of Environmental Resources

The department shall have the power and its duty shall be:

(1) To order municipalities to submit official plans and revisions thereto within such time and under such conditions as the rules and regulations promulgated under this act may provide.

(2) To approve or disapprove official plans and revisions thereto.

(3) To order the implementation of official plans and revisions thereto.

...

§750.16. Hearings and appeal.

...

(b) Any order, permit, or decision of the department under this act, except as otherwise provided by section 10(10) and section 11 of this act, shall be taken, subject to the right of notice and appeal to the Environmental Hearing Board, pursuant to section 1921-A of The Administrative Code of 1929, as amended, and the act of June 4, 1945, (P.L. 1388, No. 442), known as the " Administrative Agency Law," as amended.

Statutory Construction Act, 1 Pa. C.S. §1900 et seq.:

§1922. Presumptions in ascertaining legislative intent.

In ascertaining the intention of the

General Assembly in the enactment of a statute the following presumptions, among others, may be used:

...

(3) That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.

...

Regulations promulgated by the Environmental Quality Board for the Environmental Hearing Board, codified at 25 Pa. Code §21.1 et seq.:

§21.36 Publication of notice.

Publication of a notice of action or proposed action by the Department or Board in the Pennsylvania Bulletin shall constitute notice to or service upon all persons, except a party, effective as of the date of publication.

§21.52 Timeliness and perfection.

(a) Except as specifically provided in §21.53 of this title (relating to appeal nunc pro tunc), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin unless a different time is provided by statute, and is perfected in accordance with subsection (b).

(b) No appeal from the granting of a permit, license, approval, or certification shall be deemed to be perfected unless and until the recipient of the permit, license, approval, or certification is served with a notice of appeal in accordance with § 21.51 (relating to

commencement, form, and content of appeals).

(c) An appeal which is perfected in accordance with the provisions of this section but does not otherwise comply with the form and content requirements of §21.51 of this title will be docketed by the Board as a skeleton appeal. The appellant shall, upon request from the Board, file the required information or suffer dismissal of the appeal.

(d) The provisions of subsections (a) through (c) supersede the provisions of 1 Pa. Code §§35.5, 35.6, and 35.7 (relating to informal complaints) and §§35.9, 35.10, and 35.11 (relating to formal complaints.

§21.53 Appeal nunc pro tunc.

(a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc;

the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in Courts of Common Pleas in the Commonwealth.

(b) The provisions of subsection (a) supersede the provisions of 1 Pa. Code §§ 35.5, 35.6 and 35.7 (relating to informal complaints) and §§ 35.9 and 35.10, and 35.11 (relating to formal complaints).

Ordinance No. 130-83 of the Borough of Newry, adopted November 14, 1983, (Planning Modules referred to on the face of the resolution as its attachments not reproduced):

RESOLUTION FOR PLAN REVISION

RESOLUTION OF THE (SUPERVISORS) (COUNCILMEN) OF NEWRY (BOROUGH) BLAIR COUNTY, PENNSYLVANIA (hereinafter "the municipality").

WHEREAS Section 5 of the Act of January 24, 1966, P.L. 1535, No. 537, known as the "Pennsylvania Sewage Facilities Act", as Amended, and the Rules and Regulations of the Pennsylvania Department of Environmental Resources (Department) adopted thereunder, Chapter 71 of Title 25 of the Pennsylvania Code, require the municipality to adopt an Official Sewage Facilities Plan providing for sewage services adequate to prevent contamination of waters and/or environmental health hazards with sewage wastes, and to revise said plan whenever it is necessary to determine whether a proposed method of sewage disposal for a new development conforms to a comprehensive program of pollution control and water quality management, and

WHEREAS BOROUGH OF NEWRY has proposed the development of municipal sewerage

facilities and described in the attached Planning Module for Land Development, and proposes that such subdivision be served by BOROUGH OF NEWRY sewage systems, and

WHEREAS the municipality has reviewed the Planning Module for Land Development for the proposed subdivision and determined that the proposed method of sewage disposal does not conform to and is not included in the approved "Official Plan" of the municipality of the Borough of Newry for sewerage facilities.

WHEREAS the BOROUGH OF NEWRY finds that the subdivision described in the attached Planning Module for Land Development conforms to applicable zoning, subdivision, other municipal ordinances and plans, and to a comprehensive program of pollution control and water quality management.

NOW, THEREFORE, BE IT RESOLVED that

the (Councilmen) of the (Borough) of NEWRY hereby adopt and submit to the Department of Environmental Resources for its approval as a revision to the "Official Plan" of the municipality the above-referenced Planning Module for Land Development which is attached hereto. The municipality hereby assures the Department of the complete and timely implementation of the said plan as required by law. (Section 5, Pennsylvania Sewage Facilities Act as amended).

I, DENNIS R. SMITH, Secretary, Newry Borough Township Board of Supervisors (Borough Council) (City Councilmen), hereby certify that the foregoing is a true copy of the Borough Resolution #130, adopted 14, November, 1983.

Environmental Hearing Board

221 North Second Street, 3rd Floor

Harrisburg, PA. 17101

Gerald W. Wyant, Appellant

Box 185

Newry, PA.

(Telephone: 814-695-7250)

v.

Commonwealth of Pennsylvania

Department of Environmental Resources,

Appellee

Docket No. 84-422-M

(1) NOTICE OF APPEAL FROM THE ISSUE OF NPDES PERMIT NO. PA 0081621 TO THE BOROUGH OF NEWRY UNDER THE CLEAN STREAMS ACT:

(2) NOTICE OF APPEAL FROM THE ISSUE OF PERMIT NO. 9784403 TO THE BOROUGH OF NEWRY UNDER THE CLEAN STREAMS ACT:

(3) REQUEST FOR LEAVE TO APPEAL, NUNC PRO TUNC, PLANNING APPROVAL GRANTED TO THE BOROUGH OF NEWRY UNDER THE SEWAGE FACILITIES ACT;

(4) MOTION TO CONSOLIDATE PROCEEDINGS IN THE MATTERS ABOVE.

APPELLEE

1. The Appellee, Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter sometimes identified simply as "the Department of Environmental Resources" or "The Department" or "the Appellee") has issued, under the Act of June 22, 1937, P.L. 1987, No. 394, as amended, 35 P.S. §691.1 et seq. (hereinafter sometimes identified simply as "The Clean Streams Act"), permits designated NPDES Permit No. PA 0081621 and Permit No. 9184403,

to the Borough of Newry, of the County of Blair, Commonwealth of Pennsylvania (hereinafter sometimes identified simply as "the Borough of Newry" or "the Permittee"), which permits authorize the discharge of treated sewage waste water into Poplar Run, a tributary of the Frankstown Branch of the Juniata River, from a point source in the Township of Blair, also of the County of Blair, Commonwealth of Pennsylvania (and hereinafter sometimes identified simply as " Blair Township or "the Township").

2. The discharge referred to in the preceding paragraph will, it is believed, result from the operation of a sewage treatment or disposal facility proposed to be constructed by the Borough of Newry at or near the site of the point source in Blair Township, which facility is of a type called an "aereated lagoon."

3. The Appellee has issued, under the Act of January 24, 1966, P.L. (1965) 1535, No. 537, as amended, 35 P.S. § 750.1 et seq. (hereinafter identified simply as "the Sewage Facilities Act"), a permit or planning approval authorizing revision or amendment, by the Borough of Newry, of its official plan for sewage services to areas within its jurisdiction, which revision or amendment includes a proposal for construction and operation of the facility referred to in the preceding paragraph.

4. The actions taken by the Appellee and described in the three preceding paragraphs are the actions from which appeal is here taken or sought to be taken.

5. Notice that the Appellee had taken the action described in Paragraph 1, supra, was published November 17, 1984, 14 Pa. B 4197.

6. Notice that the Appellee had taken the action described on Paragraph 3, supra, was published January 14, 1984, 14 Pa. B 188.

7. Dates upon which notices of the actions described above were published as proposed actions, or as actions for which application had been made, are, to the extent known, given here, together with the citation to the place in the Pennsylvania Bulletin at which the notices can be found: (a) Permit No. 9784403 under the Clean Streams Act, July 7, 1984, 14 Pa. B. 2342; (b) NPDES Permit No. PA 0081621 under the Clean Streams Act, March 24, 1984, 14 Pa. B. 1030.

APPELLANT

8. The Appellant, Gerald W. Wyant ( hereinafter sometimes identified simply as "the Appellant), is an individual who

resides at Box 185, of the Township of Blair, in the County of Blair, Commonwealth of Pennsylvania.

9. The Appellant has rightful possession legal and beneficial interest, ownership, use, estate in fee simple absolute, and title, sole and exclusive, to the land upon which the Borough of Newry proposes to construct and operate the sewage disposal or treatment facility described in Paragraph 2, supra, and from which the Borough of Newry proposes to discharge pollutants into Poplar Run, under the authority of the permits to which reference was made in Paragraph 1, supra; this land comprising approximately 44 acres situated wholly within Blair Township.

10. The Appellant is aggrieved, and has an interest which is or may be adversely affected, by the actions of the Depart-

ment of Environmental Resources from which he here appeals or seeks to appeal.

11. The Appellant is directly affected by the actions of the Department of Environmental Resources from which he here appeals or seeks to appeal.

12. The Appellant has hitherto expected, and the Commonwealth of Pennsylvania, by the enactment, adoption and enforcement of its Constitution, statutes, common law, and regulations, has encouraged him to expect, that the enjoyment and use of his lands such as is now threatened by the actions to which objection is here made would be protected and preserved.

13. The Appellant has hitherto put the lands described in Paragraph 9 to productive agricultural use, which includes cultivation of wheat, corn, and other grains and raising strawberries,

and if the actions he here appeals or seeks to appeal can be prevented, plans to continue such productive use.

14. The value, use, and benefits to the Appellant of the lands described in Paragraph 9, including but not limited to the lands upon which the Permittee proposes to operate his sewage facility, will be significantly impaired or destroyed by the actions taken by the Appellee to which he here objects.

15. The Appellant fears that if he is not here permitted to voice his objections to the actions of the Department of Environmental Resources that he is appealing the issues he seeks to raise will be foreclosed and he will, without opportunity to be heard, be deprived of an interest in liberty and property.

NOTICE TO THE APPELLANT OF ACTIONS TAKEN AND APPEALED

16. The notices published by the Department of Environmental Resources of the actions, proposed or final, from which the Appellant here appeals or seeks to appeal are hereby incorporated, as published in the identified locations in the Pennsylvania Bulletin, by reference herein and made a part hereof.

17. The notices identified in the preceding paragraph, or some of them, failed to sufficiently describe the location of the sewage disposal facility proposed to be constructed and operated by the Borough of Newry, and the proposed point source of effluent discharge into Poplar Run in the adjoining Township of Blair, so that the Appellant, or any person similarly situated and motivated by a reasonable concern for the prudent management of his affairs, might be apprised and learn in a timely fashion of

the potential adverse effect of these actions on his own property.

18. The Appellant was given no notice, actu al or constructive, of the proposed or final actions of the Department to which he here objects, or of any application therefor, by the posting of a written summary or description of these applications or actions, prominently and timely, at or near the vicinity of the site of the proposed construction by the Borough of Newry, upon his land, of the sewage treatment or disposal facility, or near the proposed source of pollutant discharge, from his land, by the same Permittee; nor did he receive the equivalent of such notice.

19. The Appellant was given no notice, actual or constructive, of the proposed or final actions of the Department to which he here objects, by timely mailing

to him at his residence or place of business, or delivering to himself personally or to his legal agent, or to a responsible person present at his residence or place of business, a written summary or description of these actions, or of any application therefor; nor did he receive the equivalent of such notice.

20. The notice to the Appellant, actual or constructive, of the proposed or final actions of the Department to which he here objects, as given to him or received by him, was not such notice as is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the actions and afford them an opportunity to present their objections, nor was it such notice as one desirous of actually informing the Appellant might reasonably adopt to accomplish it.

21. The Appellant has been deprived of the opportunity to be heard on the actions of the Department to which he here objects because he lacked sufficient and timely notice of the application for, and the pendency of, these actions.

22. The notice, actual, or constructive, of the proposed and final actions taken by the Department and here at issue was, with respect to the Appellant, deficient under the statutes of the Commonwealth of Pennsylvania and lawful regulations thereunder, including but not limited to the Act of June 4, 1945, P.L. 1388, No. 442, as amended, 2 Pa. C.S. §101 et seq., known as the Administrative Agency Law, and regulations thereunder; the Clean Streams Act, and regulations thereunder; and the Sewage Facilities Act, and regulations thereunder.

23. The notice, actual or constructive,

of the proposed and final actions taken by the Department and here at issue was, with respect to the Appellant, insufficient and untimely, as a consequence of which he has been denied a meaningful opportunity to be heard in the process of taking these actions, the promulgation of which has deprived and threatens to deprive him of liberty, property, and interests in liberty or property; all of which has occurred without due process of law, in violation of the Fourteenth Amendment to the United States Constitution and the Constitution of the Commonwealth of Pennsylvania.

...

PROCEDURAL MATTERS

126. Matters of fact and law set forth in Paragraph 1 through Paragraph 23, supra, establish good cause for granting the Appellant leave to file nunc pro tunc

an appeal of the planning approval granted by the Department of Environmental Resources under the Sewage Facilities Act, which action is described in Paragraph 3, supra.

127. Appeal of the issuance of permits to the Borough of Newry by the Department of Environmental Resources under the Clean Streams Act involves questions of law and fact that would also be involved in an appeal from the grant of planning approvals to the Borough by the Department under the Sewage Facilities Act.

128. The appellant does not seek to raise extensive issues in an appeal under the Sewage Facilities Act that he does not or could not appropriately seek to raise in his appeals under the Clean Streams Act.

129. The appeals of the issuance of

NPDES Permit No. PA 0081621 and Permit No. 9784403 involve common questions of law and fact.

130. The Appellant is a proper party to proceedings on all actions to which he objects herein.

COMMONWEALTH OF PENNSYLVANIA

Environmental Hearing Board

GERALD W. WYANT,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Appellee

AND

BOROUGH OF NEWRY,

Permittee Docket No. 84-422-M

PRE-HEARING MEMORANDUM

Filed May 15, 1985

J. Randall Miller, Esquire

Attorney for the Appellant

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Altoona, PA. 16601

(814) 943-1462

A. APPELLANT'S CONTENTIONS OF FACT

As was stated above, the factual allegations made in the Appellant's initial pleading are incorporated herein by reference; this Section describes changes and additions to those allegations. For the sake of clarity and organization these changes or additions will here be referenced to the paragraph number ( in the initial pleading ) of the allegation with which they are associated.

3. The planning approval issued by the Appellee and authorizing revision or amendment by the Permittee of its official plan for sewage services to areas within its jurisdiction in fact approved plans for a facility significantly different in siting, design, and construction than the facility finally authorized by Water Quality Management Permit No. 9784403. It was this earlier plan,

rather than the plan for the facility finally authorized, that was approved by the Blair County Planning Commission and adopted by the affected municipalities under Chapter 71 of Title 25 of the Pennsylvania Code.

7. The just-mentioned planning approval was published by the Appellee as a proposed action in 13 Pa. B on December 10, 1983, and as a final action on January 14, 1984. The plan amendment or revision was approved by the Appellee before or without valid adoption by affected municipalities of plan provisions.

...

B. CONTENTIONS OF LAW AND CITATION TO AUTHORITIES

Standing to Appeal and Related Issues

The matters asserted in paragraphs eight (8) through fifteen (15), inclusive,

of the Appellant's initial pleading establish his standing to pursue this administrative appeal and to raise the statutory and constitutional questions it involves. Together with the allegations made in paragraphs one (1) through seven (7), inclusive, of the same document, they establish the Appellant as one who because of the interest he has at stake was and is entitled by law to proper notice of, and opportunity to participate in, proceedings conducted by the Department with respect to the matters here at issue.

As an aggrieved person who is directly and adversely affected by the actions of the Department herein complained of, the Appellant has the right to appeal them to this Board, under both the Clean Streams Act, as amended 1980, October 10, P.L. 894, No. 157, §1, 35 P.S. §691.7, and the Sewage Facilities Act, 1966,

January 24, P.L. (1965), 1535, No. 537, §16, added 1974, July 22, P.L. 621, No. 208, §9, 35 P.S. §750.16.

The Appellant's interest as a farmer/landowner, particularly as described in paragraph nine (9), paragraph thirteen (13), and paragraph (14) of his initial pleading, is sufficiently direct to distinguish itself from the generalized public interest of persons denied a right to formal hearing under the regulations of the Department, 25 Pa. Code § 91.16(b). Landowners similarly but less directly affected by actions of the Department were nevertheless held to have standing to challenge the issuance of a Clean Streams Act permit in Community College of Delaware County v. Fox, 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975).

Decisions supporting the standing of

the Appellant to maintain this action also include Committee to Preserve Mill Creek v. Secretary of Health, 3 Pa. Cmwlth. 200, 281 A2d 468 (1971); and Loudon Hill Farm, Inc. v. Milk Control Commission, 420 Pa. 548, 217 A.2d 735 (1966 ).

Appellant contends that because of his direct interest in the matters before the Board in this appeal he is a "party" to the proceedings of the Department for the purposes of the Administrative Agency Law, 1978, April 28, P.L. 202, No. 53, 2 Pa. C.S.A. §101 et seq. In Department of Insurance v. The Pennsylvania Coal Mining Assn., 25 Pa. Cmwlth. 3, 358 A.2d 745 (1976), the Court held that for purposes of the provision in the predecessor of the aforementioned statute requiring that parties be given notice of any adjudication by an agency:

> a person is a party to an admin-

istrative proceeding if named as such or if he may become a party by timely action if authorized by other applicable statutory law to do so or if his interest therein is of constitutional proportions...

358 A.2d 745 at 748.

Appellant's interest in the subject of these proceedings is of constitutional proportions. In particular, paragraphs eight (8) through fifteen (15) of his pleading, especially paragraphs twelve (12) and (15 ), establish that he has an interest in liberty or property which is here at stake and which is protected from deprivation without due process of law by the Fourteenth Amendment of the Federal Constitution.

The hallmark of property for purposes of the Fourteenth Amendment is an

individual entitlement grounded in state law, which cannot be removed except for cause: Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L.Ed. 2d 265, 102 S.Ct. 1148 (1982); Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 56 L.Ed. 2d 30, 90 S.Ct. 1554 (1978); Goss v. Lopez, 419 U.S. 565, 42 L.Ed. 2d 725, 95 S.Ct. 729 (1975); Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed 2d 548, 92 S.Ct. 2701 (1972) (1972); Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed. 2d 287, 90 S.Ct. 1011 (1970).

Similarly, the Pennsylvania Supreme Court, in Hardee's Food Systems, Inc., v. Department of Transportation, 495 Pa. 514, 434 A.2d 1209 (1981), has stated that:

> It is fundamental that a landowner may not be deprived of a constitutionally protected

> property right by the Commonwealth's exercise of its police power without a meaningful opportunity to be heard...

434 A.2d 1209 at 1212. There, the "incident of ownership or occupancy of land" recognized to be "constitutionally protected property right" was a landowners right of ingress to and egress from an abutting public highway; the Appellant can, but does not here feel it necessary, to cite authorities to support his contention that the actions taken by the Department have directly affected "incidents of his ownership and occupancy" deserving of at least equal recognition.

One incident of the Appellant's ownership protected by state law requires particular mention, however. The permits and approvals issued to the Permittee .

portend a threatened condemnation by the Permittee of the Appellant's land. The Eminent Domain Law of Pennsylvania provides that a prospective condemnee may file preliminary objections to the declaration of taking challenging, inter alia, the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated. Act of 1964, Sp. Sess., June 22, P.L. 84, art IV §406, as amended, 1969, December 5, P.L. 316, §1, 26 P.S. §1-406. And the Permittee here is without the power or right to take the Appellant's land to construct a sewerage treatment plant until plans and specifications have been submitted to the Appellee and approved in accordance with existing laws. The Borough Code, Act of 1966, February 1, P.L. (1965) ____, No. 581, §2022, 53 P.S. §48501;

the Clean Streams Act, 1937, June 22, P.L. 1987, art. II, §207, 35 P.S. §691.207; and the Administrative Code, 1970, December 3, P.L. 834, No. 275, §30, 71 P.S. §510-104.

But if the Appellant were to wait until a declaration of taking of his land is filed by the Permittee before challenging with preliminary objections its power and right to appropriate it, he would be likely to hear the Court of Common Pleas decide that the issue had already been decided by actions of the Department of Environmental Resources, that it is foreclosed to him by his failure to exhaust his administrative remedies, that the Court is not competent to decide complex engineering, economic, social and scientific issues and will defer to the expertise of the appropriate state agency, or that it lacks

jurisdiction to review via collateral attack the final actions of the Department. See, for example, In re Condemnation of Right of Way in Greencastle Borough, 37 D&C 2d 575, 7 Adams L.J. 147 (1966).

Due process considerations come into play whenever state action that finally terminates or cuts off an interest in liberty or property takes place: Logan above, 71 L.Ed. 2d 265 at 273; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed 865, 70 S.Ct. 652 (1950).

SECTION B CONTINUED

Insufficiency of the Notice Given to the Appellant

The actions taken by the Appellee and complained of in this proceeding were final orders, decrees, decisions, determinations or rulings by a government

agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all parties, or persons properly made parties, thereto, and were "adjudications" within the meaning of the Administrative Agency Law, cited above, 2 Pa. C.S.A. §101 et seq.

Decisions finding, in similar circumstances, that an adjudication had taken place include: Hardee's Food Systems v. Department of Transportation, 495 Pa. 514, 434 A.2d 1209 (1981); and Einsig v. Pennsylvania Mines Corp., 69 Pa. Cmwlth. 351, 452 A.2d 558 (1982). The regulations of the Department themselves, at 25 Pa. Code §91.16, support this contention.

As a party to an adjudication, the Appellant had a right under the Administrative Agency Law to reasonable notice

of and opportunity to be heard concerning these actions before they were taken, without which notice and opportunity the actions taken are invalid. 2 Pa. C.S.A. §504; Hardee's Food Systems, supra.

Furthermore, the failure to provide adequate notice to the Appellant is a jurisdictional defect that invalidates the actions already taken by the Department. Clark v. Department of Public Welfare, 58 Pa. Cmwlth. 142, 427 A.2d 712 (1981); North Alabama Express, Inc., v. United States, 585 F.2d 783 (5th Cir. 1978).

"Reasonable notice" of administrative action, according to Clark, is notice which is reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present

their objections. Clark applies to administrative agencies the constitutional notice standard of Mullane v. Central Hanover Bank & Trust Co., cited above, which standard is more fully set forth in paragraph twenty (20) of the Appellant's pleading.

Mullane found defective a notice by publication to beneficiaries of a trust where notice by direct mail was feasible; under its standard, notice to the Appellant by one or both of the means recited in paragraphs eighteen (18) and nineteen (19) of his pleading was required to satisfy the demands of due process. Under Mullane, too, notice by publication in an official register which failed to adequately identify the property affected by proposed administrative action was surely defective.

Though not the ultimate authority

on reasonable notice, the regulations of the Department also have some relevance. As a respondent or person directly affected by the actions of the Department, the Appellant was entitled, under 25 Pa. Code §91.16(a), promulgated under the Clean Streams Act, 1937, June 22 P.L. 1987, No. 394, §5, 35 P.S. §691.5, to more direct notice than could be afforded by publication in the Pennsylvania Bulletin.

Under the same authority the Department adopted 25 Pa. Code § 92.61, requiring that public notice must be published by the applicant near the entrance to his premises and in nearby places of his application for an NPDES permit to discharge pollutants, and must contain specific, detailed information concerning the application. The Appellant contends that it is the

intent of this regulation that the public notice should be posted in places near the site of the proposed discharge, so that participation of interested members of the affected public might be elicited; but, in any case, the regulation here cited was not complied with.

SECTION B CONTINUED:

Procedural Matters

Regulations of the Environmental Hearing Board provide, at 25 Pa. Code §21.53(a), that the Board, upon written request and for good cause shown, may grant leave for the filing of an appeal nunc pro tunc. The standards applicable to what constitutes good cause are the common law standards applicable in analogous cases in the Courts of Common Pleas of the Commonwealth.

One of the more common situations

which bears some analogy to the situation of the Appellant here and which arises from time to time in the Courts of Common Pleas of the Commonwealth is that in which a petition, equitable in nature, is made by a defendant to strike off or open a default judgment entered against him through a praecipe after his failure to answer or otherwise plead to a complaint within the time period fixed by the Pennsylvania Rules of Civil Procedure.

In general, if an order, decree or judgment has been entered without notice to a party who is entitled to notice, and if this failure to issue or to serve process is apparent on the record, the party may demand that the order, decree or judgment be stricken off as void, at least to the extent that it affects his interest. (Citations omitted)

Occasionally a default judgment is stricken because of an irregularity in the process issued or in the service thereof. (Citations omitted).

A judgment may be opened, as opposed to being stricken, under the same circumstances, and for this purpose defects need not appear on the face of the record itself. Judgments were opened where the defendant was not actually served with process in (Citations Omitted).

Inadequate or improper service of process is also grounds for opening a judgment. (Citations Omitted). And actual ignorance by the defendant of the fact that an action had been instituted has without more been sufficient in some cases to justify the opening of a default judgment. (Citations Omitted).

The last group of decisions follow the general principle that a petition to

open, being equitable in nature, Williams v. Allegheny Union Plaza, Inc., 231 Pa. Super. 170, 332 A.2d 493 (1974), is addressed to the discretion of the court, Watts v. Jenkins, 226 Pa. Super. 469, 313 A.2d 775 (1973), and may be granted if the defendant's failure to act was explainable or excusable, (Citations Omitted).

END SECTION B

COMMONWEALTH OF PENNSYLVANIA

Environmental Hearing Board

GERALD W. WYANT,

APPELLANT

.VS.

COMMONWEALTH OF PENNSYLVANIA,

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

APPELLEE

AND

BOROUGH OF NEWRY,

PERMITTEE

DOCKET NO. 84-4220M

APPELLANT'S REPLY TO PERMITTEE'S MOTION TO DISMISS

AND NOW, this 10th day of October, 1985, comes the Appellant, Gerald W. Wyant, by and through his Attorney, J. Randall Miller, and respectfully represents as follows:

1. The matters of fact and law set forth and alleged in Paragraphs numbered One (1) through Twenty-Three (23), inclusive, and

One-Hundred_Twenty-Six (126) through One-Hundred-Thirty (130), inclusive, of the Appellant's original pleading, filed with the Honorable Board on December 17, 1984 and including his notices of appeal, request for leave to appeal nunc pro tunc, and motion to consolidate proceedings, are hereby incorporated herein by reference and made a part hereof.

2. Additional matters of fact set forth and alleged in Section A, Paragraphs numbered Three (3) and Seven (7) of the Appellant's Pre-Hearing Memorandum filed with the Honorable Board on May 15, 1985 are hereby incorporated herein by reference and made a part hereof.

3. Pages One (1) through Four (4), inclusive, (subtitled "standing to Appeal and Related Issues"), pages Five (5) through Six (6), inclusive,

(subtitled "Insufficiency of Notice Given to the Appellant") and pages Twenty-Nine (29) through Thirty (30), inclusive, (subtitled "Procedu ral Matters"), all from Section B of the Appellant's Pre-Hearing Memorandum, filed with the Honorable Board on May 15, 1985, are hereby incorporated herein (insofar as they set forth legal grounds in support of this Reply) by reference and made a part hereof.

...

WHEREFORE, Appellant respectfully prays the Honorable Court to deny the relief requested by the Permittee in its motion to dismiss.

Respectfully submitted,

_____

J. Randall Miller

Dated: October 10, 1985

...

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. _____ _____Term, 1985, Filed

December ____, 1985

GERALD W. WYANT,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

DEPARTMENT OF ENVIRONMENTAL RESOURCES,

AND

BOROUGH OF NEWRY,

Respondents

PETITION FOR REVIEW

AND NOW, this _____ day of December 1985, comes the Petitioner, Gerald W. Wyant, by and through his Attorney, J. Randall Miller, Esquire, and respectfully represents to the Honorable Court as follows:

...

7. Respondent Borough of Newry proposes to construct and operate a municipally-

owned sewage treatment facility upon land owned and farmed by the Petitioner in the adjoining Township of Blair.

8. On January 14, 1984, the Respondent Department of Environmental Resources caused to be published in the Pennsylvania Bulletin a notice that it had approved a revision of the Official Sewage Facilities Plan of the Borough of Newry to provide for construction of a sewage treatment facility.

9. The aforementioned notice did not say that the sewage treatment facility was to be located in Blair Township; nor did it indicate Department approval of revisions of the official sewage facilities plans of the Township of Blair and the Township of Freedom, two other municipalities affected by plan provisions.

...

14. As respects the Petitioner, the notice published by the Respondent Department of Environmental Resources on January 14, 1984 was inadequate to apprise him of the action it had taken and was legally ineffective to begin running of the th irty-day period specified for filing an appeal under 25 Pa. Code §21.52.

15. The Petitioner was given no actu al or constructive notice by Respondents of the pendency or final approval by the Department of Environmental Resources of the official proposal by the Borough of Newry to construct a sewage treatment facility upon his land, other than the defective constructive notice by publication in the Pennsylvania Bulletin to which reference was made above.

16. The notice given to the Petitioner by the Respondents of the proposed and

final actions here at issue was deficient under the statutes of the Commonwealth of Pennsylvania and lawful regulations thereu nder, including but not limited to the Administrative Agency Law, the Pennsylvania Sewage Facilities Act and regulations, including regulations of the Department, thereunder.

17. The notice given to Petitioner by the Respondents of the proposed and final actions here at issue was, with respect to the Petitioner, insufficient and untimely, as a consequence of which he was denied a meaningful opportunity to be heard in the process of taking these actions, which, unless the order of the Environmental Hearing Board to which objection here is made is reversed, will deprive him of liberty, property, and interests in liberty or property; all without due process of law, in violation

of the Fourteenth Amendment to the United States Constitution and the Constitution of the Commonwealth of Pennsylvania.

18. Matters of fact and law alleged above were alleged or raised in proceedings before the Environmental Hearing Board, which, nevertheless, dismissed the Petitioner's request for leave to file nunc pro tunc without oral argument or evidentiary hearing thereon.

19. The Environmental Hearing Board of the Commonwealth of Pennsylvania has jurisdiction to grant the Petitioner leave to appeal nunc pro tunc under the Pennsylvania Sewage Facilities Act and the Administrative Agency Law.

20. The Petitioner alleged or raised before the Environmental Hearing Board matters sufficient to constitute good cause for granting leave to file nunc pro tunc under the standard enunciated in 25

Pa. Code §21.53(a).

WHEREFORE, Petitioner respectfully prays the Honorable Court to vacate the order entered by the Enfironmental Hearing Board on November 6, 1985, dismissing his appeal under the Pennsylvania Sewage Facilities Act and remand the case to the Board for evidentiary hearing if necessary on the facts alleged by Petitioner in support of his request for leave to file the appeal nunc pro tunc, with instructions binding the Environmental Hearing Board to grant Petitioner leave to so proceed if he can prove those allegations.

Respectfully submitted,

J. Randall Miller, Esquire
Attorney for the Petitioner
Mellon Bank Building
1206 11th Avenue
Altoona, PA. 16601
(814) 943-1462

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

GERALD W. WYANT,

Petitioner

.vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

AND

BOROUGH OF NEWRY,

Respondent

NO. 3247 C.D. 1985

BRIEF FOR PETITIONER

Petition for Review of the Order of the Environmental Hearing Board of the Commonwealth of Pennsylvania on November 6, 1985 in EHB Docket No. 84-422-M.

III. STATEMENT OF QUESTIONS INVOLVED

1. Does ownership, possession and use of land upon which a neighboring municipality plans to build a sewage

plant confer an interest of constitutional proportions in the outcome of an adjudication approving the plan, and therewith status as a party entitled to notice adequate under the Administrative Agency Law?
This question was not answered below.
2. With respect to such an interest, does constructive notice by an official publication that identifies neither the owner and location of the land itself nor the participation of adjoining townships in the plan satisfy the due process standard of the Administrative Agency Law and other statutes or regulations?
This question was not answered below.
3. When the notice due to a proper party to an adjudication is deprived of due process because the agency neglects its duty to see that he is given reasonable notice of its action, is there good cause,

under the standard applied by the Courts of Common Pleas in analagous cases, to grant him leave to appeal that action nunc pro tunc?

This question was answered in the negative below.

4. (see brief)

V. SUMMARY OF ARGUMENT

The Borough proposes to construct a sewage plant on land owned, farmed and inhabited by Gerald Wyant in an adjoining Township. When it gave its blessing to this plan the Department took an action that directly threatens to deprive Gerald Wyant of liberty and property protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This action was taken in an adjudication to which, although absent, he was a proper party. As such he was entitled by the Adminis-

trative Agency Law to adequate notice of the proceedings.

Instead the Department caused certain publications to be made in the Pennsylvania Bulletin. These failed to identify Gerald Wyant or his land, or to say that the plan it approved is in fact the joint plan of several municipalities, among them the Appellant's own, whose participation is essential and was later solicited, procured and approved by the Department without publication of its actions.

The notice constructively given by this means to Gerald Wyant was not such notice as is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, nor was it such notice as one desirous of actually informing

Gerald Wyant might reasonably adopt to accomplish that end. The notice was therefore deficient under the standard, constitutionally mandated, of the Administrative Agency Law, and did not satisfy the standards of other statutes and regulations.

This lack of adequate notice is a jurisdictional defect that, with respect to Gerald Wyant at least, invalidates the Department's actions until the defect is cured. And insofar as the plan essentially affects municipalities other than the Borough, the Department's approval of their official resolutions adopting the plan cannot become final - and therefore subject to the time limitation for appeal to the Environmental Hearing Board - until notice of that action has been published.

Even were it otherwise, Gerald

Wyant has still, under regulations of the Environmental Hearing Board that have the force of statute, alleged good cause for them to grant him leave to appeal nunc pro tunc. In analagous cases before the Courts of Common Pleas of this Commonwealth, a petition, equitable in nature, to strike off or open a judgment that adversely affects a party will be granted if he can show that the notice he received of the proceedings that led to the judgment was legally insufficient.

So much follows from and is consistent with decisions of the higher Courts of the Commonwealth. In this case the inadequacy of the notice given is of constitutional dimensions. Its unreasonableness bespeaks a negligence, wrongful in its effect to the Appellant. Unless his right to

appeal is restored, he will remain the victim of a breakdown in the routine process of Departmental adjudication.

IN THE SUPREME COURT OF PENNSYLVANIA

GERALD W. WYANT,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

and

BOROUGH OF NEWRY,
Respondent

DOCKET NO. 74 W.D.
Allocatur, 1987.

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the Order of the Commonwealth Court of Pennsylvania on January 7, 1987, in

Docket No. 3247 C.D. 1985, affirming on Petition for Review the Order of the Environmental Hearing Board of the Commonwealth of Pennsylvania on November 6, 1985 in EHB Docket No. 84-422-M.

III. QUESTIONS PRESENTED FOR REVIEW

1. When a municipality adopts and resolves to implement a revision of its official sewage facilities plan, and the Department of Environmental Resources, by order enforceable against the municipality for noncompliance, approves the plan revision, has there occurred a final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the persons properly made parties to the proceeding?

2. Does ownership, possession and use of land upon which a neighboring municipality resolves to construct a sewage treatment plant confer an interest of constitutional proportions in the outcome of an agency adjudication approving the resolution, and, therewith, status as a party entitled to notice adequate under the Borough Code and Administrative Agency Law?

3. With respect to such an interest, does constructive notice by an official publication that identifies neither the owner and location of the land itself nor the official but unpublished participation of adjoining townships in the plan satisfy the due process standard of the Administrative Agency Law and other statutes and regulations?

4. When the notice that is due to a person properly a party to an adjudication is

deficient or not given and consequently he is not heard therein, can the adjudication become final so that the period allowed by law for appeal begins to run against him?

5. If a person properly made a party to a proceeding is deprived of due process because the agency or other officer neglects its duty to see that he be given reasonable notice of the adjudication, is there good cause, under the standard applied by the Courts of Common Pleas of this Commonwealth in analogous cases, to grant him leave to appeal the outcome of the adjudication nunc pro tunc?

Questions (1) and perhaps (2) were answered in the negative by the Commonwealth Court, which did not reach the others on that ground. The Environmental Hearing Board answered Question

(5) in the negative and Question (4) in the affirmative; it did not address the other questions.